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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1985

WILLIAM I. KAUFMAN

Petitioner,

v.

McCRORY STORES DIVISION OF McCRORY CORP. (N.Y.) sub. of RAPID AMERICAN CORP. (Del.); HELENA L. BOWES, Individual; GEIGER & LORIA REPORTING SERVICE, INC. (Penna.);

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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EDITOR'S NOTE

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QUESTIONS PRESENTED

A. Whether a Notary Public, commissioned by the State of Pennsylvania was acting under Color or State Law during the taking and transcribing of State Court depositions and within the reach of 42 U.S.C. #1983.

B. Whether private parties, so named in this lawsuit acted in alleged conspiracy in Misconduct in arranging for, altering; then having a Notary Public alter and change two state court depositions, knowing such acts were clearly illegal and beyond Pennsylvania Law.

C. Whether the Petitioner's Civil Rights were violated by respondents seeking to deny him a Fair Trial because of the altered and changed depositions, thereby limiting his Constitutional Rights to Due Process in the 5th and 14th Amendments; under 42 U.S.C. #1983.

D. Whether the District Court's decision that a Notary Public was not acting officially during the taking of state court depositions was detrimental to all Pennsylvania depositions.

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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

William I. Kaufman (Kaufman) petitions for a Writ of certiorari to review a Judgment of the United States Court of Appeals for the Third Circuit rendered on April 1, 1986.

OPINIONS BELOW

The July 25, 1985 Memorandum, Order and Judgement of the United States District Court for the Middle District of Penna. explaining and deciding the case of Kaufman v. McCrory Stores Division et. al. may be found in App. A and B attached. The District Court on that day decided to dismiss this lawsuit on a Motion for Dismissal by the Respondents and asked the Clerk of Courts to close the file.

Petitioner then filed an Appeal with the United States Court of Appeals for the Third Circuit which was filed and docketed on August 7, 1985. The United States Court of Appeals then affirmed the Judgment of the District Court on April 1, 1986. (App. C). A formal mandate was issued on April 23, 1986.

JURISDICTION

On April 1, 1986 the Court of Appeals entered judgment affirming the Dismissal of the case of Kaufman v. McCrory Stores Division et. al (app. C.) The jurisdiction of this court is invoked under Title 28 United States Code, section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V.

Nor shall any person... be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment XIV:

Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises out of a separate lawsuit brought by Kaufman against Penn

Needle Art Co. in the Court of Common Pleas of Allegheny County, Pennsylvania filed in November 1982. Petitioner had worked under contract for Penn Needle on a commission basis as a Manufacturer's Representative. Because of loss of past and future commissions, Kaufman filed the above state court suit in Allegheny County.

During that lawsuit, Kaufman asked two employees of the McCrory Stores Division of McCrory Corporation to appear at the offices of Naugle and Sullivan for legally ordered depositions on June 28, 1983. McCrory Corporation is a fully owned subsidiary of Rapid American Corporation of New York City, N.Y. which controls all activities of McCrory Stores Division and McCrory Corporation. The subpoenae to appear were arranged for and prepared by Kaufman's then Counsel, Mr. Patrick Sullivan of Harrisburg, Penna. Sullivan

was later replaced by Kaufman acting Pro. Se. on September 27, 1983. There were also 2 Pittsburgh Counsel, John and George Shorall. They left the case on September 27, 1983. Attorney Peter Skeel of Pittsburgh, Penna. took over the case from Kaufman in February 1984. Kaufman handled the case acting Pro. Se. from September 27, 1983.

Petitioner Kaufman's claim arises from allegations that the two McCrory agents and employees falsely testified in key parts of their depositions that concerned two meetings, one of April 5, 1983 and the other a Post Meeting of June 19, 1981. (App. D and E) To attempt to eliminate this purposely false testimony, they and other employees of McCrory Corporation and Rapid American Corporation arranged for respondent Helena L. Bowes, employed by respondent Geiger and Loria, while performing her official duties in taking

and transcribing depositions, to omit, change and alter portions of the testimony in the transcriptions. Bowes is the daughter of Virginia Loria, owner of Geiger & Loria.

The two McCrory employees, William J. Agnew and Michael A. Boukis had met the day before on June 27, 1983 with Paul Berger, a principal of Penn Needle Art Co., R. Dennis Osterman Esq. a lawyer for Penn Needle and an associate lawyer with Berkman, Ruslander, Pohl, Lieber and Engel, Attorneys of Pittsburgh, Pennsylvania, and a lawyer or lawyers of McCrory Corporation. The lawyer or lawyers of McCrory Corporation were employed as part of a full time legal staff under control of McCrory Corporation and Rapid American Corporation of New York, N.Y. This meeting of June 27, 1983 took place at the McCrory Corporation, York, Pennsylvania offices. The meeting was held to discuss how Agnew and Boukis should

testify and what they were to say at the depositions the next day.

On June 28, 1983, before the start of the two depositions, a stipulation was arranged with the Reporter-Notary Public Bowes for her to waive sealing and certification and she did so accordingly, by not placing her seal on the finished depositions and by not placing her commission ending date near the jurat as required by the Pennsylvania Notary Public Act of 1953. (1/) Helena Bowes had been sent to take the depositions by Virginia Loria her mother and employer.

1/ Sec. 160, Position of Seal and date of expriration of commission:
(a) The seal of a Notary Public shall be impressed opposite the jurat, and affixed in such manner as to make a legible impression on all documents executed.

(b) The date of expiration of a Notary's commission and the location of his office shall be written, typed, or stamped immediately below the signature of the notary. (P.L. 1323).

Arrangements had been made prior to the depositions between Virginia Loria and Patrick Sullivan, Esq.

The two depositions were attended by Sullivan, Kaufman's Counsel, Helena Bowes the Reporter-Notary Public, Osterman, Counsel for Penn Needle, the two deponents, Agnew and Boukis in consecutive order and Kaufman.

Petitioner heard Osterman, Agnew and Berger all talking about being in York, Pennsylvania the day before at McCrory headquarters, in a first recess of about 15 to 20 minutes long. In a second recess of about 10 to 15 minutes duration, Kaufman heard Agnew saying to Paul Berger, paraphrased as follows:

AGNEW TO BERGER: I'm glad we had a chance to meet yesterday in York after our meeting with the lawyer (or lawyers) to go over the open orders now in. Would you please follow them up with Pittsburgh.

The transcripts of the two depositions were completed on July 19, 1983 and copies were sent to Sullivan and to Penn Needle's Counsel, Osterman of Berkman, Ruslander et. al. immediately. Kaufman never saw the finished depositions until Sept. 27, 1983 when he took over the Penn Needle case himself Pro. Se. after his then Pittsburgh Counsel, John and George Shorall resigned from the case. Because of the pressing need to file various papers, Kaufman did not study the two depositions until October 9 and 10, 1983. When he finally saw them, Kaufman immediately noticed that the two recesses had been completely blocked out. All reference to the first one was simply obliterated by making the period before the recess and after the recess in the Agnew deposition appear to run together and the second recess was removed by changing the ending time of the Agnew Deposition to 1:00 PM. The second Boukis deposition was left

to start in the text at its proper time of 1:00 PM. This meant that the 2 depositions appeared by the times put in by H. Bowes to start and end at exactly the same time, a literally impossible situation.

In a later investigation by Trooper Belsterling and Corporal DiPierro of the Pennsylvania State Police, White Collar Crime Unit, in March 1985, they felt strongly enough after interviewing Helena L. Bowes about the 2 depositions to go to the Dauphin County, Pennsylvania, District Attorney's Office for a charge of one count of falsifying evidence. This charge is still pending.

Petitioner Kaufman upon first reading the 2 depositions found other important differences from what he had heard at the depositions on June 28, 1983 and what was now on the completed versions. No questions had been asked by Sullivan to Agnew about two key meetings in the actual

questioning until after the first recess. These meetings were the meeting between Kaufman and Agnew on April 5, 1983 (App. D and E) and the second Post meeting on June 19, 1981 between Agnew and Boukis. The first meeting concerned a discussion over prices to be charged by Penn Needle on the big selling #604 drapery item and the attempt by Agnew to coerce Kaufman into reducing his commission rate, and the second meeting concerned a discussion between Agnew and Boukis about only letting Kaufman stay on the line about a year or until approx. July of 1982 when Kaufman was actually terminated by Penn Needle. Both the meeting of April 5, 1982 and the Post Meeting of June 19, 1981 were completely denied by Agnew and Boukis. (App. D and E).

Instead when the two meetings appeared in the Agnew test, the few questions that remained from many that were asked by

Sullivan were placed out of context in a far earlier part of the Agnew deposition.

Agnew had answered to all questions about the two meetings of April 5, 1982 and the second post meeting of June 19, 1981 with either "I don't remember or I don't recall." He had answered questions about the first meeting of June 19, 1981 fully but denied all knowlege of the 2nd post meeting, a subject that was deleted from the Agnew test completely, both questions and answers.

Instead what appeared in the completed depositions was as follows exactly:

SULLIVAN Q In reference to April 5, 1982 or in the spring of '82, did you have a discussion with William Kaufman on the pricing of the items that you were purchasing from Penn Needle Art Co?

AGNEW A Would you clarify that question? My job as a buyer is working with merchandise, is discussion or pricing items at all times. I'm not sure what you are asking.

In that changed version of the question and

answer, Agnew's finished text had simply deleted the I don't remember, I don't recall to "Would you clarify", certainly not the truth but a version designed to compromise the truth of what had actually been said at the depositions.

Other important changes were noted by Kaufman. At the actual meeting of April 5, 1982 between Agnew and Kaufman where they had discussed pricing of a large volume drapery item #604, Agnew had drawn on a paper, 2 circles, one a large one and one a small one. He then said to Kaufman, "Isn't it better to have a smaller piece of a large pie than a larger piece of a smaller pie or no pie at all." While making that statement, he drew 2 pie pieces within the circle to illustrate his point. He then went on to say that if Kaufman did not agree to cut his commission, he would pick up the telephone, call Penn Needle and have Kaufman off the line in five minutes. The

meeting of April 5, 1982 is well (App. D,E) documented by letters between Kaufman to Berger on April 6, 1982 and Berger to Kaufman on April 13, 1982, concerning pricing. The text of what appeared in the finished depositions is as follows: (exactly)

SULLIVAN:	Q	There's certain ways of approaching pricing. Did you ever discuss the amount of commission that Mr. Kaufman was getting for his sale?
AGNEW	A	No, Sir, I did not discuss the amount of commission.
SULLIVAN:	Q	Do you ever remember in April of 1982 of drawing circles for Mr. Kaufman and saying there is a large circle for a large purchase and a smaller circle for smaller purchases, if the price couldn't be met? In other words you could buy more with the big circle and with the smaller circle you could buy less.
AGNEW:	A	I really don't recall that.
SULLIVAN:	Q	You don't remember that?
AGNEW:	A	No

SULLIVAN: Q Did you ever tell Mr. Kaufman about calling Penn Needle to reduce his commission in order to get a better price?

AGNEW: A Telling him.

SULLIVAN: Q Yes

AGNEW: A I don't recall, no.

Sullivan had actually asked the question about the circles in the proper way as he was told both orally and in writing on 3 different occasions, how the circle statement was really framed. This question as it appeared was changed to go with Agnew's untruthful answers about not discussing the changing of commission, at the April 5, 1982 meeting in his office.

Other alterations were also made. There were questions that were asked about the July 19, 1981, post meeting that were completely removed. That meeting concerned the discussion between Boukis and Agnew where Boukis had asked Agnew to give Kaufman only a year on the line to help get the #604 item started in the chain. Also

an important question was deleted about which key people from McCrory's York and New York offices and Rapid American's New York office had requested Agnew to cut commissions or eliminate Manufacturers Representatives and get good pricing on strong volume items. All these names were deleted from the finished text. H. Bowes had a hard time spelling these names and had to ask Sullivan for them to be spelled out letter by letter.

The two completed depositions totaled 105 pages and ran from 10:00 AM to 1:25 PM with no breaks shown even though two had actually occurred; a total time of approximately 3 1/2 hours. Yet only 105 pages of testimony were used on 25 lines per page paper, thus averaging to only 30 pages per hour. This is from an invoice of Geiger & Loria shown as Exhibit #58 attached to the Complaint. The relatively small amount of pages was accounted for

by the amount of questions, answers, recesses and pages that were omitted in the completed versions of the depositions.

The Boukis deposition also showed evidence of untruthful testimony and changes to make that evidence appear right. When asked about the Post meeting of June 19, 1981, Mr. Boukis answered: (paraphrased)

BOUKIS: I attend a lot of meetings in the course of a year. I can't remember all of them.

This statement was completely deleted in the final version of the text about the Post meeting, as follows: (exactly)

SULLIVAN: Q On this date, did you meet with Berger and Agnew out of the company of Mr. Kaufman?

BOUKIS: A Not that I recall.

SULLIVAN: Q Was there any discussion at this time whatever, concerning the possibility that you would work with the vendor and without the sales representative Mr. Kaufman?

BOUKIS: A I cannot recall any discussion like that.

SULLIVAN: Q Did you have any influence with your discussions that Kaufman's services would not be utilized?

BOUKIS: A No, I did not.

Other questions were asked and removed from the completed text about the Post meeting of June 19, 1981. They included questions about where it was held, when it was held and what it was all about. Also the question about the meeting with Berger and Agnew was incorrectly phrased as it was properly asked as "Did you meet with Agnew out of the company of Kaufman and Berger." Sullivan had been told both orally and in writing that Berger and Kaufman were both downstairs in the McCrory reception area when the Post meeting of June 19, 1981, occurred. The meeting was on the 2nd floor. The question was phrased properly when asked by Sullivan. It was changed in the finished text.

During October 1983 Kaufman noted to the State Court of Pittsburgh, about

the alterations and omissions in the depositions in various papers submitted to that court. All these allegations were denied emphatically both orally and in writing by Osterman. Kaufman called Helena Bowes to a deposition on October 28, 1983 where she was only permitted by her attorney James Ronca to give her name, address and occupation.

Finally on November 18, 1983, he entered, Pro Se., Motions into the Court of Judge Wettick to strike the wrongful parts of the two depositions and to ask for sanctions against H. Bowes for not answering and to compel her to testify. Both motions were denied, partly due to the fact that the true nature of the depositions had been hidden from Kaufman past the timely period allowed for protesting wrongful depositions. The Honorable Judge Wettick's orders had the effect of forcing Kaufman to give up his

right to due process since he would have been forced to go into court with altered and tainted evidence. His entire chance of Fair Trial on the McCrory issue had been fully jeopardized.

After hearing advice from his then new Counsel, Skeel of Pittsburgh, that it would appear impossible to gain the truth from the McCrory witnesses based on the altered depositions, Kaufman settled the case with Penn Needle for $24,500 in April 1984. McCrory, Rapid American, H. Bowes and Geiger & Loria had thus helped Penn Needle reduce the McCrory part of his claim to almost nothing. In so doing, respondents caused Kaufman much physical and emotional stress. On April 18, 1985 this suit was filed.

REASONS FOR GRANTING THE PETITION

A. A Notary Public, commissioned by Pennsylvania and designated as an Officer under law was acting under Color of State Law during the taking and transcribing of State Court depositions and within reach of 42 U.S.C. 1983.

Penna. along with many other states refers in its Notary Public Act of 1953 Sec. 149-150 to the office of Notary Public. It also refers in Sec. 154 of that act to an Oath of Office required by every Notary Public who takes this office in Penna. It reads as follows:

> "Every notary on his appointment and before he enters upon the duties of the office of notary public shall take and subscribe the constituional oath of office."

The fact that a Notary Public is considered an Office holder or officer is done for very good reason. Without that power of an officer of the state, there would be little incentive for individuals giving affidavits or depositions to feel compelled to tell the truth since normally no judge at Bar is present. The power of that office of Notary Public to compel a truthful answer is like an unseen but well felt force that helps keep the American Judicial Process working with its reliance on the truth.

In Sec. 164 of the Notary Public Law of 1953 it states in this Sec.:

> Notaries shall have the power to take depositions and affidavits,

In Sec. 166 it states:

> The official acts, protests and attestations of all notaries public, certified according to law, under their respective hands and seals of office, including the dishonor of all bills and promissory notes, of notice to the drawers acceptors or endorsors thereof, may be received and read in evidence as proof of the facts therein, stated, in all suits now pending or hereafter to be brought. Any party may be permitted to contradict by other evidence any such certificate.

Proper evidence, good and true in a myriad of cases both civil and criminal is where the power of the Notary Public is brought to bear and where it must meet the Color of State Law requirement of 42 U.S.C. 1983 2/: The nexus of her relationship to

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2/ 42 U.S.C. #1983 provides that: "Every person who, under color of any statute, ordinance, regulation, custom, usage, of any state,..subjects or causes to be subjected, any citizen of the United States..to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

the State of Pennsylvania is through the law and the Pennsylvania and U.S. Constitutions which she is sworn to uphold. She acts for the State of Pennsylvania to uphold justice and help maintain a system of law and order, which without her sworn to, and duly certified documents, that system could not long exist.

In analyzing the duties and powers of the office of Notary Public in the State of Pennsylvania and other states that designate Notaries as Officers or Officials, there is little doubt that they do not run a department or preserve the peace or play the active roles of other officers of the state. But, nevertheless their duties are vital in the fact that their roles in government place them in almost daily active contact with citizens of every walk of life.

As this Court has noted in Bernal v. Fainter, 81 L. Ed. 2d, 1975, (1984). It says:

"We recognize the critical need for a notary's duties to be carried out correctly and with integrity. But a notary's duties, important as they are hardly implicate of responsibilities that go to the heart of represensitive government., Rather these duties are essentially clerical and ministerial."

But within those powers and duties that are ministerial and clerical lies the power to affect people's lives as it has happened with the Petitioner Kaufman. His former case in Pittsburgh against Penn Needle was ruined to a large extent and his Civil Rights to Due Process were severely violated, yet he has not been able to gain the Federal remedy to which he is entitled to under 42 U.S.C. 1983. Surely the Petitioner cannot be alone in the damage to his life and property that a Notary acting with Misconduct and with other parties can do.

Further in Bornal it states by this court as follows: (on page 1984).

"To be sure considerable damage could result from the negligent or

> dishonest performance of a notary's duties, But the same could be said for the duties performed by cashiers, building inspectors, the janitors who clean up the offices of public officials and numerous other categories of personnel upon whom we depend for careful, honest service."

The court is certainly right in its concept of the damage a Notary could do as against others in other walks of life, but there is an important difference, the others mentioned above do not have the sanctity of the law to maintain within the judicial system. After all, every paper or document that a Notary certifies if done properly with her seal could ultimately find its way to court where the truth of that document could even have a life or death effect as in a capital criminal case.

The Notary cannot guarantee that some one coming before her in the taking of a deposition or the swearing to an affidavit is telling the truth but her presence there and her seal and certification can

hold severe punishment for those found to have compromised the truth. None of the people mentioned above have that power to maintain the law and help maintain the country's system of Justice as it is known in American today.

From another section of Bernal on page 1983 it reiterates what the Court of Appeals has said about Notaries:

> "With the power to acknowledge instruments such as wills and deeds and leases and mortgages; to take out of court depositions; to administer oaths; and the discretion to refuse to perform any of the foregoing acts, notaries public in Texas are involved in countless matters of importance to the day to day functioning of state government."

In the case of Krueger v. Miller, 489 F. Supp. 321 (1977), (E.D. Tenn.) aff'd without opinion, 617 F. 2d 603, (6th Circuit 1980) the Tennessee District Court found that a Notary Public commissioned by the Governor of Tennessee, (similar to Pennsylvania) had acted with Misconduct and under Color of State Law. The Court found

that the Plaintiff in this case, Deborah Krueger had her Constitutional Rights denied from her by the Defendant Ron Miller because he was acting as a state official, a Notary in official Misconduct. This case is quite similar to this one at bar now since both Bowes and Miller were exceeding their powers under law in their respective states. Bowes had powers under Penna. vania Law to take depositions but she did not have power as an officer and examiner at depositions to change the text, alter ending times or omit parts of it simply because private parties asked her to do so. Miller in Tennessee did not have the power under law to invade Krueger's home and deny her Constitutional Rights. Similarly Bowes did not have the right to deny Kaufman's Rights to Due Process by creating Evidence that was partially false and untrue merely because she had the power given her by the State of Pennsylvania. An

Officer of the Law regardless of how minor or how major their positions may be cannot abuse the law or people's constitutional rights with a blanket immunity from the law they serve under. The District Court decision gives Bowes that immunity from 42 U.S.C. #1983.

Many other states commission Notaries in a similar manner to the State of Pennsylvania and consider them officers as does Pennsylvania. Under New York Statute #130 it refers to the Office of Notary Public many times. And in N.Y. Statute #8 under Commissions of Officers it states as follows:

> "Commissions of notaries public shall be signed by the secretary of state, or by a person or persons in the department of state designated by the secretary of state and shall be sent to the county clerk of the county in which such notaries respectively reside."

And from N.Y. Statute #10, Official Oaths it recites this: (Page 571).

Every officer shall take the file the oath of office required by law,

and further from this section:

"The oath of office of a notary public or commissioner of deeds shall be filed in the office of the clerk of the county in which he shall reside."

From N.Y. Statute #135 came this: (165)

"Every Notary Public duly qualified is hereby authorized and empowered within and throughout the state to administer oaths and affirmations, to take affidavits and depositions".

There is little doubt that from the law of both the states of Pennsylvania and New York that the legislatures of these states and others meant specifically that Notaries were given the power of officers and also the responsibility that goes with the power of law. They are certainly given far more power at depositions than that of any other stenographer or secretary as the District Court's decision would indicate. From New York Jurisprudence (42 NY Jur #1) comes this: under Generally, definitions

"A notary public is defined as an officer whose duty is to attest the genuineness of any deeds or writings in order to render them available as evidence of the facts herein contained."

under #2 Nature of Office

"The very designation of "notary public" indicates a relation which the incumbent of the office sustains to the body politic and it is impossible to regard him as other than a public officer."

under #10 Sec. III. Powers, Duties and Functions

"The powers of notaries public are defined by law, and their acts within their legitimate sphere, have force and solemnity because they have the express authorization and sanction of statute. A notary has only such powers as he may lawfully derive from the statutes of the state and he has no power to take an acknowledgement of any paper unless that power is given to him by statute."

and in Sec. 12 N.Y. Jur - Taking Depositions and Testimony

"Subject to certain exemptions such as an attorney for a party or a prospective party or his employee, or persons with an interest, depositions may be taken within the state by a person authorized by the laws of the state to administer oaths. It would seem that New York notaries are not authorized to take the deposition outside the state."

Since New York and Pennsylvania laws are similar with regard to Notaries, it would appear to a certainty from the above and Pennsylvania statutes that the power of Notaries in the taking of depositions clearly comes from the power granted by the state. If they abuse that power it is an abuse under 42 U.S.C. #1983 when that abuse removes constitutional rights to Due Process.

Other states also view Notaries as officers under the law of various states. Among the states that do are: (as listed).

> Indiana Statutes-33-16-2-1 (49-3503) "b. A notary public shall be appointed and commissioned by the governor. A notary public shall hold office for four (4) years."
>
> Official Code of Georgia 45-17-3 Oath of office "Before entering on duties of his office, each notary public shall take and subscribe before the clerk of the superior court the following oath."
>
> Florida Jur 2nd III Notaries Public (39-54) #39. A "notary public" has been defined as an officer whose duty is to attest the genuiness of any

deeds or writings in order to render them available as evidence of the facts therein contained."

Code of Virginia Title 47.1, #47.1-21
"Term of office-The term of office of a notary public shall be four years."

Texas Civil Statutes, ARt. 5949, Par. 5
"Nothing herein shall prevent any qualified Notary Public from performing the duties of his Office from and after qualification and before the receipt of his commission."

South Dakota Codified Laws: Title 18, 18-1-1 Appointment by secretary of state-Term of Office Authority, "The secretary of state shall appoint one or more notaries public, who shall hold their office for eight years unless sooner removed by the secretary of state".

General Laws of Rhode Island, chapter 30, 42-30-3 Appointment of notaries and justices - "and every notary public and justice of the peace so appointed, shall hold office until the first day of July,"

Alaska Statutes, Part 3 Administrative Officers, Sec. 44.50.030. Term of Office. The term of office of a notary public is four years from the date of commission."

Ohio Revised Code, chapter 147 (47.03) Term of office, bond, oath, removal, "Before entering the duties of his office, he shall take and subscribe an oath to be indorsed on his commission."

While notaries publi are considered by, in many states including Pennsylvania to be officers or officials, their duties may vary among the different states. Yet all have a common thread; the maintenance of truth and justice in a system where private interests too often without proper legal restraints would tend to bend that truth to their own best interests.

Pennsylvania case law also echoes the common bond of the various state in affirming the status of notaries as officers. From the case of Davey vs. Ruffel, 3 Dist. 75, 15 Pa. C.C. 272, 11 Lanc. Rev. 59, 1893 comes this,

> "Notaries public are not county, but state officers, empowered to act in any part of the state". and it goes further in saying:
> "As to Notaries Public, another confusion has been caused by the act of 1893, seeming to treat them as county officers, when they are in fact and in law, state officers appointed by the Governor and confirmed by the Senate,"

And in the case of Commonwealth ex rel. v.

Shindle, 12 Pa. C.C., 158 (1986) it states as follows:

> "The offices of justice of the peace and notary public are state offices and are incompatible"

From the Penna. Law Encyclopedia, sec. 1, page 116 come this:

> "A notary pubic is a public officer whose function is to administer oaths, to attest and certify certain documents in order to give them credit in foreign jurisdictions' and further under sec. 2 "to take depositions and affidavits." The title of this section is "Jurisdiction and Powers".

While the District Court seems to agree with the principal that Notaries in Penna. are officers by saying: (App. B,4)

> Notaries [illegible] are commissioned by the Secretary of the Commonwealth 75 P.S. #151 (Purdon Supp. 1985) for a term of four years. 57 P.S. #148. These duties include the power to administer oaths and affirmations, id. at #162, and to take depositions. Id at #163. Officially, it would appear that [illegible] was thus acting under color of state law when she was recording [illegible] depositions, and

consequently, subject to suit under the Civil Rights Act of 1871."

Yet the district court goes on to say that Bowes was not acting under Color of State Law because she was merely a privately employed stenographer in between the time that she gave the oath and the time that she was to have duly certified the testimony, with her Seal, signature and commission ending date, something she did not do, since she only signed as a Notary Pubic with no seal or ending date.

Yet the District Court has tended to ignore both Case Law and the Penna. Rules of Civil Proceedure in saying: (App. B 5)

"The complaint clearly reveals that Bowes was hired in her capacity as a privately employed stenographer to record the testimony of the two dependents. Stenographers are not licensed by Pennsylvania and anyone may engage in this occupation who feels he or she has the necessary competence."

The presumption that the District Court takes in saying that Kaufman hired a

stenographer is incorrect both according to the Complaint and also according to the facts involved. From the complaint in Par. 9 comes this:

> At that time Mr. Osterman, as Plaintiff remembers asking Ms. Bowes, Court Reporter assigned to the depositions by the reporting service firm of Geiger and Loria Reporting Service Inc. to note the recess on the record accordingly.

Kaufman in a Pre-Deposition meeting had asked his counsel to hire a Reporter Notary Public, for the depositions. He had asked for a Court Reporting Firm to supply a Notary Reporter. This was made part of the Complaint with exibits attached as follows: exibit #3. Cover Sheet of Agnew deposition:

DEPOSITION OF :	WILLIAM J. AGNEW
TAKEN BY:	PLAINTIFF
BEFORE:	HELENA L. BOWES, REPORTER, NOTARY PUBLIC

and from Complaint Exibit #8, Cover Sheet of Boukis deposition:

DEPOSITION OF: MICHAEL A. BOUKIS

TAKEN BY: PLAINTIFF

BEFORE: HELENA L. BOWES
REPORTER, NOTARY
PUBLIC

Also entered with the complaint were these exibits of Bowes signing sheets:

Exibit #12 (exact wording)

> "I Helena L. Bowes, a Reporter-Notary Public, authorized to administer oaths and take depositions in the trial of causes, and having an office in Harrisburg, Pennsylvania do hereby certify that the foregoing is the testimony of Michael A. Boukis,"

and in Exibit #7, she did likewise for Deponent Agnew.

That the District Court understood from the complaint, the function of Bowes as a Reporter-Notary Public is clear from this on (App. B 6):

> "The issue of state action arises in this case because in accordance with custom, Bowes had obtained her commission as a notary public so that as a matter of convenience to litigants she could administer the oath or affirmation to the desponents."

There was no misunderstanding on the part of the District Court as to the function and normal requirement of a Court Reporter at a State Deposition that she must be a Notary in order to give an oath and take a Deposition as proven by the exhibits attached to the Complaint.

But from a practical matter as explained by Case Law and Anderson on Pa. Rules of Civil Proceedure she was acting as an examiner at the two depositions by birtue of her being an officer of the state of Pennsylvania, as a Notary Public. The presence of an officer or examiner is necessary at a deposition to insure that during the course of the actual deposition and the later transcribing of it, no changes, alterations or omissions occur that would alter the truth of the text. Even a deletion of one word or the addition of a word by a Notary-Reporter can make for

an entirely different meaning as when the name Berger was inserted in the question to Boukis about the post meeting of June 19, 1981.

Penna. case Law explains this well in the following decisions: From Melvin v. Handley, 6 Lanc. Rev. 47 1 Wilcox 235 (1888) it says,

> "An examiner is an officer of the Court which has appointed him. His duties are to cause the witnesses of the respective parties to come before him, and after they have been sworn, to reduce their testimony to writing and certify it to the court."

And from Beck v. Bethlehem Borough, 2 Pa. C.C. 511, 3 Lanc. Rev. 386.2, Lehigh 325 (1886) the role of the examiner is fully explained in the light of the present case as follows:

> The duties of an examiner are chiefly clerical, and he should put down the answers of the witnesses as delivered and note the objections therein."

And further from Pa. Law is the following case of Eugene Ltd. v. Cusani D & C 479 (1932) saying:

1. A rule to open judgement will not be disposed of on the basis of so-called depositions which do not appear to have been taken before any qualified person nor to have been given under oath.
2. Parties or their attorneys may agree to waive certain formalities in the taking of depositions, but witnesses must testify under oath before a qualified person competant to certify the matter to court.

Had Bowes not been a qualified person by virtue of her being an officer working under Statute Law of Penna., the two depositions would have had no power under law. Therefore to have taken the depositions, they would have been worthless except under Color of State Law as taken by an officer of the state.

The importance of having a Reporter-Notary Public act as an official examiner under law is that she in effect officiates after the deponent is placed under oath so that the deponent knows that while he is in her presence, he must tell the truth under penalty of perjury. The deponent knows

that while he testifys, regardless of the fact that he is not in a Court of Law, he is obliged to tell the truth and that any efforts before hand to urge him or plan for him to speak untruthfully as alleged in this case must not be heeded and must be disregarded.

Anderson on Pennsylvania Civil Practice explains further: Rule 4017.5 states, (page 512).

> If the deposition is taken exclusively upon oral examination, the examiner takes no actual part in the questioning or interrogation of the witnesses. After having administered the oath, he then presides over the taking of the deposition but does not examine the witness.

From Anderson 4017.7 Recording of Testimony Manner of Recording, (page 513)

> "The examiner must "personally" or by some one acting under his direction and his presence, record the testimony of the witness."

and also from Anderson, #4017.8 pg. 513,

> "When there is a recital in the deposition by which the examiner

certifies that the witnesses were duly qualified and examined before at a stated time and place, it will be presumed that the depositions were reduced in writing by him or at his direction."

This kind of recital was made part of the depositions and therefore it would indicate that Bowes was the examiner all the way from start to finish of the depositions on July 19, 1983. Finally Anderson states in Rule 4017.9 page 514, Editing Prohibited;

> Rule 4017.9 (a) also requires although not expressly, the making of a verbatim record of the testimony of the witness.
> This makes it improper for the examiner to summarize or edit the answers of the witness in any way. That such a limitation exists is obvious from the fact that the deposition is to be used at a trial or hearing in lieu of testimony and therefore the court or jury should have the benefit of the exact words of the witness rather than a "hearsay" adaptation of the witnesses words by the examiner."

Bowes was therefore the examiner at the deposition from the oath, through the taking of testimony on the stenotype

machine to its reduction to writing. She could have only been the examiner by virtue of her office. A stenographer could not have acted accordingly nor was a regular stenographer ever hired or meant to be hired, by the Petitioner Kaufman.

And anther reason for granting the Writ under this section is that both the Penna. Rules of Civil Proceedure and the Federal Rules of Civil Procedure specify that Depositions are to be taken "before an officer authorized to adminster oaths by the laws of the United States" or "of the place where the examination is held.." This is from the Penna. Rules of Civil Procedure, Rule 4015 and from U.S.C. Fed. Rules C.P. Rule 28.

B. Private Parties, so named in this lawsuit, acted in alleged conspiracy and misconduct in arranging for, altering, then having a Notary Public alter and change two state court depositions, knowing that such acts were clearly illegal and beyond Penna. laws.

McCrory Stores Div., McCrory Corp. and Rapid American Corp. were acting in their own best interests in having the depositions changed to suit their needs and that of their key employees, Agnew and Boukis. They wished to make sure that nothing of the true nature of the two meetings of April 5, 1982 and June 19, 1981 would ever come out. Virginia Loria, principal of Geiger & Loria Reporting Service Inc. also had her own best interest at heart when she sent her daughter Helena Bowes to take the depositions on June 28, 1983. Therefore law as has been set down by this Court makes it clear that Private Parties acting in conspiracy with State Officers fall under the reach of 42 U.S.C. # 1983.

The reason for this is clear and obvious; so that private persons who induce or conspire with a Public Official such as a Notary Public do not simply escape from the possible penalties of a lawsuit when

they themselves are important players in the overall conspiracy. Some of the important cases that have settled this issue are as follows: Adickes v. S.H. Kress and Company, 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed 2d 142 (1970), Lugar v. Edmondson Oil Company, Inc. U.S., 102-S Cr. 2744, 457, U.S. 922, 73 L. Ed. 2d, 482, (1982) Tower v. Glover U.S. 104-S Cr. 2820, 104 S. Ct. 2820 (1984), Dennis v. Sparks, 449 U.S. 24, 28, 101 S. Ct. 183, 186-187, 66 L. Ed. 185, (1980), and from the District Court's Memorandum, (App. B-3) Unger v. Hacker, 578, F. Supp. 142 (E.D. Pa. (1983).

The District Court in this case has tried to compare Polk County v. Dodson 454 U.S. 312, 102 S. Ct. 445, 70 L. Ed. 2d 501 (1981) to this case but in the light of the fact that the private parties herein mentioned allegedly had Bowes change and alter the depositions during the course of

her official duties as a Reporter-Notary Public, this could hardly be compared to a case where a Public Defender acting as any other lawyer would, defended her client. The private parties in this case had an abundance of legal counsel, both in York with their in-house legal staff and in New York where some of the top officials of McCrory Corp. and Rapid American are lawyers with long experience in the law. Also Geiger and Loria as run by Virginia Loria had much experience dealing with the law and depositions both at the state and Federal levels. The knew the law.

Yet they had an officer of the state of Penna. make changes in depositions that was in clear violation of the Pa. Notary Public Law of 1953 and the Penna. Rules of Civil Procedure, Rules 4015, 4016, 4017. By having the depositions changed and altered: and then witheld from Kaufman so it would be difficult if not impossible to

have the state court strike the illegal parts or grant sanctions, they were acting to aid and abet a State officer in Misconduct in her official duties under statute law.

Therefore Bowe's actions and the private parties involved was comparible to Tower v. Glover rather than Polk County v. In Tower it states:

> State public defenders were not immune from civil rights liability with regard to alleged intentional misconduct by virtue of alleged conspiratorial action with state officials to deprive client of his constitutional rights, 42 U.S. C.A. #1983.

The reasons for the changes in the depositions by McCrory Corp. and Rapid American Corp. are twofold; 1. To protect the two companies and their top officials from the disclosure that came up in the April 5, 1982 meeting between Kaufman and Agnew that top officials of McCrory Corp. had asked the various buyers to have large volume vendors turned into house accounts

for direct dealing between McCrory's and the vendor, based on a well known policy by K-Mart Corp., and 2. to make sure that the two McCrory executives involved, Agnew and Boukis, could not be charged with any later investigation about their untruthfullness in the depositions concerning, "I don't remember, I don't recall answers about the two meetings, their denial of trying to remove Kaufman from the Penn Needle Line and their attempts to either eliminate or greatly reduce Kaufman's commission to save the companies' money on future Penn Needle purchases. For whatever reasons they may have had, Bowes and Geiger & Loria participated in the conspiracy that aided Penn Needle in its law suit, helped shield McCrory and Rapid American from embarrasing disclosures that could have discouraged Mfg. Representatives from calling on McCrory and protected Agnew, Boukis and possibly other McCrory officials and

lawyers from any possible legal harm for their untruthful testimony.

The first reason listed above was based on the following conversation between Agnew and Kaufman at the April 5, 1982 meeting: paraphrased as follows:

AGNEW: Some of the top people in New York have asked us to eliminate Reps. and deal direct with manufacturers when a line starts to do big volume with us. They are trying to do the same thing that K-Mart has done in eliminating Reps. when an item gets big.

KAUFMAN: Do they always require you to deal direct on volume lines or can you deviate from this policy if you want to?

AGNEW: We don't always have to do it. They will let us deviate from this policy if we feel it is necessary on certain lines.

Because of this conversation, names of top officials of McCrory and Rapid American were deleted from the testimony including Meshulin Riklis, principal owner of both companies.

The second reason was based on two

things; 1. That Kaufman had told Sullivan on July 6, 1983 by letter and orally that he might go to the F.B.I. and the Justice Dept. about the case in general, (Complaint Ex. 32,59) and 2. the following conversation that took place between Kaufman and Sullivan after the depositions had ended, and Boukis, Agnew, Osterman and Berger had left the office and premises (paraphrased).

KAUFMAN: "I can't get over the fact that Agnew denied all knowledge of the April 5th and June 19th meetings. He didn't remember anything about the meetings or that they ever occurred. He knew all about both meetings. And Boukis too denied any knowledge about the June 19th meeting between him and Agnew."

SULLIVAN: "Well I told you, you wouldn't get much out of Boukis, and I think you were lucky to get as much out of Agnew as you did. He helped you a lot on some of the main issues."

KAUFMAN: "Yes, that may be true but their knowledge about the two meetings was the main part of the McCrory case. Their not answering truthfully hurt the case a lot."

The reasons detailed above plus the desire of all parties concerned to cover up the planning meeting of Penn Needle and McCrory people on June 27, 1983, the day prior to the depositions, led to the compromising of the duties and powers of a duly appointed state officer, Bowes.

C. The Petitioner's Civil Rights were violated by respondents seeing to deny him a fair trial because of the altered ard changed depositions, thereby limiting his constitutional rights to Due Process in the 5th and 14th Amendments; under 42 U.S.C. #1983.

Due process was considered extremely important to the writers of the constitution and those that came after them, when they wrote the 5th and 14th amendments. Due Process is the only right in the constitution that is mentioned twice, once in the 5th Amendment and once in the 14th Amendment. The founding fathers knew that Due Process was the bond, that if preserved, would guarantee all

other rights for future generations. And when it was written into the 14th Amendment after the bloody and costly victory over the South, it was meant to further guarantee forever, that no state or its officers or officials acting for it could ever again destroy due process for any citizen regardless of race color or creed. 42 U.S.C. #1983 was enacted in 1871 by a Congress that was determined that no individual, however powerful could undo the rights guaranteed by the 14th Amendment without possible severe penalty in a civil lawsuit.

In this case now at bar, the respondents, McCrory Corp. and Rapid American Corp. had tried to aid a vendor in its lawsuit against Kaufman and at the same time attemped to conceal information from coming out that might be embarrassing or damaging to the two companies and thier leading officers and executives. So they

decided on plans on June 27, 1983 with Osterman of Berkman, Rusfander Law Firm, Berger of Penn Needle, Agnew and Bouis and a lawyer or lawyers of the companies to thwart Kaufman's Rights to Due Process by concealing parts of testimony they knew would be forthcoming the next day. They further planned that no seal would be placed on the final depositions nor commission ending dates as required by Penna. Law. This was done to insure that if ever questioned about their answers, the depositions would not be duly certified, as per the stipulation at the beginning of each deposition: and carried out by Bowes.

They further planned that if Kaufman protested the untruthful testimony given under oath, they would then have Bowes, the Reporter-Notary Public selected for the assignment by Geiger Loria, to change, alter and omit parts of the testimony that

might cause the deponents, their companies, their lawyers, officials above them, lawyers for Berkman Ruslander, and the owners of Penn Needle possible future legal harm and great embarrassment. The Rights of Due Process were shunted aside so that McCrory Corp. could help save their vendor, Penn Needle the $250,000 McCrory part of the Kaufman v. Penn Needle State Law Suit and to conceal the true nature of the two meetings of April 5, 1982 and June 19, 1981, and further to even conceal the fact the two meetings even took place. This, in spite of strong written and oral evidence to the contrary.

Balantines Law Dictionary on page 380 defines Due Process as follows:

> Due process of Law, A phrase impossible of precise definition, one which asserts a fundamental principal rather than a specific rule of law. 16, Am J2D, Const. L. #545, Law in the regular course of adminstration through courts of justice according to those rules and forms which have been established for the protection of private rights. Endicott-Johnson

Corp. v. Smith, 266 U.S. 291, 69 L. Ed. 293, 45 S. Ct. 63.

> "Due process of Law" implies and comprehends the administration of laws equally applicable to all under established rules which do not violate fundamental principles of private rights and in a competant tribunal possessing jurisdiction of the cause and proceeding by hearing upon notice. State ex rel. Sweezer v. Green 360 No. 1249, 232 S.W. 2d 897, 24 A L.R. 2d, 340"

That Kaufman's Rights were violated is clear under the above explanation of Due Process. The law in all states is designed so that what is testified in a deposition or affidavit is supposed to be true under the penalty of perjury and that what is taken down are to be the exact words of the deponents or the person who makes an affidavit, not something that is contrived at a later date to cover over any testimony which is not to the deponent or someone else's liking. Due process as properly applied does not allow for testimony under oath in a court related proceeding to be made according to the whim or caprice of

either the deponents, their employers or their associates in a business relationship. Depositions are not meant to be created for the best interests of various private parties but are meant to be tools in seeking out the truth, wherever it may lead. Regardless of private interests.

From the Penna. Law Encyclopedia chapter 9, Due Process of Law A. #271 pg. 169;

> "Due process or due process of law has been variously defined in effect, as representing the limits which the Federal Constitution places upon that exercise by a state of its sovereign power which infringes the traditional and constitutional secured rights and liberties of the individual, as meaning such an exertion of the power of government as settled maxims of law sanction, and under safeguards for protection of individual rights as those maxims prescribe, or as a legal or philosophical concept as to the extent to which a state in an exercise of its sovereign power, be permitted to deprive individuals within its jurisdiction of their lives, liberty or property."

Bowes as a Penna. State Officer however minor she may be in the overall

government of the state, was acting by and for the state of Penna. Her mother, Virginia Loria, also a Notary Public, commissioned by the state of Penna. was also acting by and for the state of Penna. when she supervised Bowes in the overall performance of her duties as a Reporter-Notary Public. When they decided to go along with the desires of McCrory and Rapid American and their associates and employees to change the depositions, they were acting for the state. Bowes and Loria perform a vital function for the citizens of the state of Penna. that they cannot do for themselves. They take depositions and authenticate and supposedly certify the documents as being what was said and done by all parties at a state court deposition. Further their presence as officers during the taking and transcribing of a deposition imports to those depositions the power of the law of the state; that any attempted

and purposeful deviation from the truth as a party knows it, it punishable under the penalties of perjury.

To attempt to have a person go into a Court of Law and force him to use evidence that has been tampered with and manipulated is reprehensible on its face and a complete denial of Due Process. From Groppi v. Leslie-Sheriff 404-U.S. 496 92-S Ct., 582 (1971) comes this:

> "Many controversies have raged about the cryptic and abstract words of the Dur Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceeded by notice and opportunity for hearing appropriate to the nature of the case."

To deprive Petitioner of a Fair Trial by purposely changing an important part of his evidence than hiding it form him so that when it was discovered, it would be difficult for to do anything about it, is not in the interest of justice nor is it a fair opportunity for hearing. It denied

Kaufman, the right to get what was due him from his property, the contract with Penn Needle and which represented years of hard work, effort and money expended, that was now taken away from him by a denial of his rights to Due Process.

And from Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 162-163 (1951) comes this as written by the late, esteemed Mr. Justice Frankfurter:

> Due Process is compounded of history, reason, the past course of decisions, and stout confidence in the strength of democratic faith which we profess."

Due Process has also been defined as how something is done as well as the way it is done. A Reporter-Notary Public as a Public Officer is supposed to support the law in every way and to uphold its very meaning, not to decide on her own and with private parties how the law is to be followed. This is a government of law not of men and women. To protect the law, this writ should be granted.

D. The District Court's decision that a Notary Public was not acting officially during the taking of state court depositions was detrimental to all Pennsylvania depositions.

The decision of the District Court saying that a Notary Public did not play an official role during the taking of the depositions in between the time she gave the oath and the time when she was to have duly certified them with her official seal, jurat and commission ending date appears to have been the first decision in either Penna. or Federal Law that makes this conclusion. No other decision could be found in this vein. It is detrimental because it sends the wrong message in future cases to lawyers, private parties and deponents, that if they decide to change the testimony as it is spoken, then there will be no recourse to the federal courts and no protection of cherished constitutional rights. It says in effect that state courts alone have the power to

decide about depositions and even if a person's rights to due process are blatantly disregarded, he cannot seek Federal protection of those rights under 42 U.S.C. # 1983.

It further states that even though it is common custom in Penna. as well as many other states to use a Court Reporting service such as Geiger & Loria and a Reporter-Notary Public such as Bowes that these persons taking depositions are no longer considered officers during the actual taking and transcribing of the depositions and therefore the deponent will feel less constrained from answering untruthfully; since the Kaufman v. McCrory case can be used to claim that the deposition was not actually taken before an officer, even if it was taken under oath. Theorectically at least, under this decision a Notary or other officer could give the oath, turn the actual recording of

the testimony, and transcription over to a regular stenographer, leave the premises and then when the deposition is finished, certify with her seal that the deposition had been taken and an oath had been given.

This is contrary to both Federal and Pennsylvania State Law which says that a deposition must be taken before an officer Pa. R.C.P.4015, F.R.C.P. U.S.C. Rule #28. The decision if allowed to stand will weaken all depositions in the state of Penna., in the Federal Judiciary and in other states that require testimony before officers.

The decision if it is allowed to stand offers Federal immunity to Notary Publics in Penna. and other states and private parties who would conspire with them in Misconduct, in the changing and altering of depositions. 42 U.S.C. # 1983 was not designed to give an entire group of public officials and private parties that conspire

with them, a shield for their illegal acts. It states "every person who under color of any statute." This decision if improperly construed will encourage improper acts in depositions that are taken without a judge at bar.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Respectfully Submitted,

William I. Kaufman
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P.O. Box 6195
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17112

William I. Kaufman
Pro Se.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM I. KAUFMAN,
Plaintiff

CIVIL ACTION
NO. 85-05904

vs.

McCRORY STORES DIVISION OF
McCRORY CORP., (N.Y.) sub of
RAPID AMERICAN CORP. (Del.)
HELENA L. BOWES, Individual
GEIGER& LORIA REPORTING
SERVICE, INC. (Penna.)
Defendants

ORDER AND JUDGEMENT

AND NOW, this 25th day of July, 1985, it is ordered that:

1. The motion of defendants, Geiger & Loria Reporting Service, Inc. and Helena L. Bowes, to dismiss plaintiff's complaint against them pursuant to Fed. R. Civ. P. 12 (b) shall be and is hereby granted and the complaint is dismissed.
2. The motion of defendants, McCrory Corporation and Rapid American Corporation, for judgement on the pleadings, pursuant to Fed. R. Civ. P. 12 (c) shall be and is hereby granted and judgement is entered for said defendants.
3. The clerk of Court shall close this file.

William W. Caldwell
United States District Judge

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM I. KAUFMAN,
Plaintiff

CIVIL ACTION
NO. 85-05904

vs.

McCRORY STORES DIVISION OF
McCRORY CORP., (N.Y.) sub of
RAPID AMERICAN CORP. (Del.)
HELENA L. BOWES, Individual
GEIGER& LORIA REPORTING
SERVICE, INC. (Penna.)
Defendants

M E M O R A N D U M

I. Introduction.

Plaintiff, William Kaufman, has filed a pro se complaint, alleging that defendants violated his civil rights under 42 U.S.C. 1983. Defendants, Geiger & Loria Reporting Service (Geiger & Loria) and Helena Bowes, have moved to dismiss the complaint for failure to state a claim. Defendants, McCrory Stores Division of McCrory Corp. (McCrory Corp.) and Rapid American Corp., after filing an answer, have moved for judgment on the pleadings

Exhibit A-1

pursuant to Fed. R. Civ. P. 12 (c).

The main issue presented is whether a privately employed stenographer who is also a notary public acts under color of state law when she records and transcribes the depositions of witnesses as part of the discovery process in a civil action.

II. Background

Plaintiff's claim arises from two depositions taken in preparation for a separate lawsuit brought by him against Penn Needle Art Co. in the Court of Common Pleas of Allegheny County, Penna. for unpaid sales commissions. Defendant, Helena Bowes, a stenographer employed by defendent, Geiger & Loria, administered oaths to the deponents, recorded their testimony, and was responsible for transcribing the depositions. Defendent, McCrory Corp., a subsidiary of defendant, Rapid-American Corp., employed the two deponents. Plaintiff was not satisfied

with the outcome of the state court action and blames the defendants. He asserts that the two McCrory Corp. employees falsely testified at their depositions and Bowes omitted, and changed, portions of the testimony in the transcription. Plaintiff claims all the defendants conspired together to accomplish these goals which violated his rights under the Fourteenth Amendment.

III. Discussion.

42 U.S.C. 1983 provides relief from conduct committed by persons acting under color of state law and violative of federally protected rights. Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L.Ed. 2d 420 (1981). While plaintiff alleges a violation, inter alia, of his right to due process, we believe that he has failed to show that defendants acted under color of state law. Plaintiff tries to satisfy the latter requirement by

relying upon Bowe's status as a notary public and as a stenographer who plays a part in judicial proceedings. He also points out that Virginia Loria, the owner of Geiger & Loria, is also a notary public and was formerly employed as a court reporter in this court. Hence, in his view, they are state officials for the purposes of section 1983. With regard to the other defendants, he claims that their partaking in the conspiracy with these state actors makes them liable as well. See Unger v. Hacker, 578 F. Supp. 143 (E.D. Pa. 1983).

Plaintiff cannot look to Virginia Loria to supply the necessary state action here. First, she had no personal involvement in the conduct forming the basis of plaintiff's claim. Thus, it is irrelevant that she is a notary public or court reporter herself. See Prochaska v. Fediaczko, 473 F. Supp. 704 (W.D. Pa.

1979). Second, her former employment by the federal government cannot constitute state action in the present.[1] Finally, despite plaintiff's contention to the contrary, only respondeat superior could involve Loria in this action and that doctrine is inapplicable to civil rights claims. See United States ex. rel. Flores v. Cuyler, 511 F. Supp. 386 (E.D. Pa. 1981).

Plaintiff's argument concerning Bowes is more plausible. She is a notary public and, of course, unlike Loria, had personal involvement in the conduct giving rise to plaintiff's complaint. In Pennsylvania,

---

(1) Additionally, we note in passing that her former status as a federal employee could not, in any event, support a claim under section 1983 which redresses wrongs committed by state actors. The distinction may not be of much substance, however, since plaintiff has an equivalent cause of action directly under the federal constitution. See Shabazz v. Odum, 591 F. Supp. 1513, 1515 n.2 (M.D. Pa. 1984).

qualified individuals are eligible for the "office of notary public", the Notary Public Law, Act of August 21, 1953, P.L. 1323, §3, as amended, 57 P.S. §149 (Purdon Supp. 1985). Notaries public are commissioned by the Secretary of the Commonwealth, 57 P.S. §151 (Purdon Supp. 1985), for a term of four years. 57 P.S. §148. Their duties include the power to administer oaths and affirmations, id. at §162, and to take depositions. Id. at §164. Superficially, it would appear that Bowes was thus acting under color of state of law when she was recording the depositions, and, consequently, subject to suit under the Civil Rights Act of 1871. Based upon case law, however, we must conclude otherwise.

In Polk County v. Dodson, 454 U. S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), the United States Supreme Court reiterated the well established standard for determining when a person has acted under color of state law for the purpose of section 1983:

> In United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941), this Court held that a person acts under color of state law only when exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."

Id. at 317-18, 102 S.Ct. at 449, 70 L.Ed.2d at 516; see also Henig v. Odorioso, 385 F.2d 491 (3d Cir. 1967), cert. denied, 390 U. S. 1016, 88 S.Ct. 1269, 20 L.Ed.2d 166 (1968); Augenti v. Cappellini, 84 F.R.D. 73 (M.D. Pa. 1979).

Using the foregoing test, the Court held that a public defender, a full time employee of the petitioner county, was not acting under color state law, and thus not amenable to suit under section 1983, when she withdrew as counsel on respondent Dodson's appeal of a state criminal conviction. The Court concluded that:

> In this case the Offender Advocate for Poke County assigned Martha Shepard to represent Russell Dodson in the appeal of his criminal conviction. This assignment entailed functions and obligations in no way dependent upon state authority. From the moment of her appointment, Shepard became Dodson's lawyer, and Dodson became Shepard's client.

> Except for the source of payment, their relationship became identical to that existing between any other lawyer and client.

Id. at 318, 102 S.Ct. at 449, 70 L.Ed.2d at 516 (emphasis added).

Polk County is dispositive of plaintiff's claim here. The complaint clearly reveals that Bowes was hired in her capacity as a privately employed stenographer to record the testimony of the two deponents. Stenographers are not licensed by Pennsylvania and anyone may engage in this occupation who feels he or she has the necessary competence. Thus, just as in Polk County, there was no action under color of state law here because Bowe's "assignment entailed functions and obligations in no way dependent upon state authority." Id.

The issue of state action arises in this case merely because, in accordance with custom, Bowes had obtained her commission as a notary public, so that as a

matter of convenience to the litigants she could administer the oath or affirmation to the deponents. Significantly, plaintiff's claim does not arise from these actions of Bowes which could only have been performed in her capacity as a notary public. If the claim did, then possibly state action would be present here since then Bowes woudl have been exercising power made possible only because she was clothed with the authority of state law.(2) Because plaintiff is alleging, however, only that Bowes altered, and omitted portions of, the depositions, a power Bowes possessed regardless of state law, plaintiff's section 1983 claim must fail.(3)

---

(2) In Polk County, the Court suggested that there may be cases in which a public defender could be found to have acted under color of state law if the defender was acting in a capacity other e than the traditional courtroom role. Id. at 324-25, 102 S.Ct. at 453, 70 L.Ed.2d at 520-21.

)3) Because of our disposition of the state action issue, we need not consider defendants' remaining arguments for not permitting plaintiff to proceed any further with this case.

We will issue an appropriate order.

William W. Caldwell
United States District Judge

Date: July 25, 1985

Exhibit B-10

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5527

WILLIAM I. KAUFMAN,

v.

McCRORY STORES DIVISION
McCRORY CORP., (N.Y.)
RAPID AMERICAN CORP. (Del.)
BOWES, HELENA and GEIGER and
LORIA REPORTING SERVICE, INC.

William I. Kaufman, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D. C. Civil No. 85-0504)
District Judge: Honorable William W. Caldwell

Submitted under Third Circuit Rule 12(6)
February 20, 1986

Before: BECKER, STAPLETON and VAN DUSEN,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

Exhibit C-1

AJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.[1]

Costs taxed against appellant.

BY THE COURT,

/s/Francis L. VanDusen
Senior Circuit Judge

Attest:

/s/Sally Mrvos
Clerk

Dated: April 1, 1986

---

[1] See district court Memorandum Order and Judgment of July 25, 1985 (Document 17 at Civil No. 85-0504, M.D. PA). It is noted that contentions first presented to this court and not presented to the district court will not be considered by this court. See Newark Morning Ledger Co. v. United States, 539 F.2d 929, 932 (3d Cir. 1976).

Tel. (717) 652-4019

BILL KAUFMAN and ASSOCIATES
Manufacturers Representatives
1609 Elbridge Road
P. O. Box 6195
Harrisburg, PA 17112

Specializing in Sales to
Discount Stores, Department Stores
and Home Furnishing Stores

April 6, 1982

Dear Paul,

As per our conversation yesterday and my meeting with Bill Agnew, McCrory's, I am listing the following prices which were approved by him and subject to final approval on the return of his merchandise mgr. tomorrow. He expects no problem on this and will be in touch with you.

604 --	63"	3.15	868 and 888 --	63"	5.74
	84"	3.45		84"	6.27
604B--	63"	3.30	Shorty drapes		1/4 24", 1/4 30"
	84"	3.55	limited basis only		1/4 36, 1/4 45"
			1000 asst.		2.30 pr.

These are the items he will be using. The D550 and the 5550 were quoted at your book price and as I mentioned he is showing some interest in, pending results in the stores.

I just talked to the manager from the Orange, N.J. store and he approved the

change on his order for the 868 and 888 drapes to $5.74 63" and $6.27 84". Would you please help this and the other orders as soon as possible. The Orange mgr. is Mr. Bob Hammond.

As I mentioned to you on the phone, Bill Agnew will be in touch with you.

Thank you for your kind consideration on the above.

Best regards,

Bill

Exhibit D-2

PENN NEEDLE ART COMPANY

P. O. Box 6593 6945 Lynn Way Pittsburgh, PA 15208

April 13, 1982

Mr. Bill Kaufman
Harrisburg, Pa.

Dear Bill:

Received your letter regarding prices submitted to McCrory's.

I hope that these prices will be implemented as quickly as possible.

I think, however, that you should bear in mind that PENN NEEDLE ART CO. is still taking the brunt of the price absorption.

Needless to say, we are trying to accommodate McCrory, but you best be aware of this.

Regarding Shortie Drapes, I stress to you again that this must be handled very delicately, and before I can commit on this item, we better be sure of what we are offering to the customer.

Very truly yours,

PENN NEEDLE ART CO.

Paul J. Berger

PJB:ES

Exhibit E-1

Supreme Court, U.S.
FILED
JUN 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1947

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM I. KAUFMAN
Petitioner,

v.

McCRORY STORES DIVISION, McCRORY CORP. (N.Y.); sub. of RAPID AMERICAN CORP. (Del.); HELENA L. BOWES, Individual; GEIGER & LORIA REPORTING SERVICE, INC. (Penna.),
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS HELENA L. BOWES AND GEIGER & LORIA REPORTING SERVICE

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Service, Inc.

COUNTERSTATEMENT OF QUESTION PRESENTED

Did a privately employed stenographer, who was commissioned as a notary public under a state statute, act "under color of any statute . . . of any state" within the meaning of 42 U.S.C. §1983 by recording and transcribing depositions of witnesses as part of the discovery process in a state court civil action?

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NO. 85-1947

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM I. KAUFMAN
Petitioner,

v.

McCRORY STORES DIVISION, McCRORY CORP. (N.Y.); sub. of RAPID AMERICAN CORP. (Del.); HELENA L. BOWES, Individual; GEIGER & LORIA REPORTING SERVICE, INC. (Penna.),
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS HELENA L. BOWES AND GEIGER & LORIA REPORTING SERVICE

The Respondents Helena L. Bowes and Geiger & Loria Reporting Services, Inc., (hereinafter "Geiger & Loria") respectfully request that this Court deny the Petition for a Writ of Certiorari, seeking review of the Judgment Order of the Third Circuit in this case. The Judgment Order is found as Exhibit C-1 in the Petition.

COUNTERSTATEMENT OF THE CASE

Petitioner's claim arose out of a previous suit filed by the petitioner in the Court of Common Pleas of Allegheny County, Pennsylvania, against Penn Needle Art Co. During that law suit, petitioner, through counsel, took depositions of William Agnew and Michael Boukis on June 28, 1983, at the law offices of Naugle and Sullivan in Harrisburg, Pennsylvania. At the request of the petitioner, Geiger & Loria, a private company, sent an employee, respondent, Helena L. Bowes, to act as stenographer.

Petitioner's suit alleged that Agnew and Boukis falsely testified and that respondent Bowes, to the detriment of petitioner, omitted and changed portions of the testimony in her transcript of their depositions. Petitioner argued (a) that the respondent Bowes' status as a notary public under the Pennsylvania Notary Public Act of 1953 (57 Pa. Stat. Ann.

§147, et seq.) rendered her stenographic services in taking the depositions action under color of state law within the meaning of 42 U.S.C. §1983, (b) that since the owner of respondent Geiger & Loria, Virginia Loria, is a notary public and former federal court employee, respondent Geiger & Loria also acted under color of state law in the premises, and (c) that all of the respondents acted together, under color of Pennsylvania statutes governing notaries public, to violate petitioner's consitutional rights protected by the Fifth and Fourteenth Amendments to the Constitution of the United States. He hence brought this action under 42 U.S.C. §1983.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition Presents No Basis For A §1983 Action.

This is simply a case of defective pleading. Petitioner has no cause of action

against respondents Bowes and Geiger & Loria under 42 U.S.C. §1983 because neither respondent acted under color of state law within the meaning of §1983. The District Court's Memorandum Order and Judgment, affirmed without opinion by the Court of Appeals, correctly applies the understanding of §1983 unvaryingly expressed by the Supreme Court in its prior decisions.

Petitioner's claim that respondent Geiger & Loria was a state actor within the meaning of §1983 is specious. As the District Court found, Virginia Loria, the owner of the respondent company, had no personal involvement in the conduct forming the basis of petitioner's claim. Thus, it was irrelevant that she was a Notary Public or was a former court reporter herself. Further, her past employment by the federal government could not be held to constitute state action. The complaint, written in vague language, in fact makes no allegations of wrongdoing against

respondent Geiger & Loria. Geiger & Loria is only mentioned as the employer of Helena L. Bowes. Therefore, only the doctrine of respondeat superior could be used to impose liability herein upon Geiger & Loria. Under the reasoning of Monell v. New York City Department of Social Services, 436 U.S. 658, 691-692 (1978), even if Geiger & Loria were deemed a state actor, liability could not be imposed under §1983 solely because it employed a tort feasor.

Nor did respondent Helena L. Bowes act under color of state law. The District Court was correct in analogizing a notary public to an attorney in a private case. In Polk County v. Dodson, 454 U.S. 312 (1981) the Supreme Court held that a public defender who was a full-time employee of the county was not acting under color of state law and not amenable to suit under §1983 when she withdrew as counsel from a criminal defendant's appeal of a state court conviction. The Court found

that her assignment entailed functions and obligations that were in no way dependent upon state authority. Once the public defender was appointed she became the defendant's attorney and the defendant became her client. The District Court correctly found Polk County to be dispositive of the petitioner's present action.

> The Complaint clearly reveals that Bowes was hired in her capacity as a privately employed stenographer to record the testimony of the two deponents. Stenographers are not licensed by Pennsylvania and anyone may engage in the occupation who feels he or she has the necessary competence. Thus, just as in Polk County there is no action under color of state law here because Bowes' 'assignment entailed functions and obligations in no way dependent upon state authority.'

Kaufman v. McCrory Stores Division of McCrory Corp., 613 F. Supp. 1179, 1182 (M.D. Pa. 1985). The courts below correctly concluded that no issue of state action in the present case arose because Helena Bowes, a privately employed stenographer, had obtained her commission as notary public as a convenience to

litigants. Petitioner's claim arises simply out of Bowes' function as a stenographer and not out of any actions performed in her capacity as a notary public. Clearly, an independent stenographer at a civil deposition is not engaged in a traditionally state function, but a duty well within the private domain.

CONCLUSION

For all of the foregoing reasons, it is respectfully urged that the petition for a writ for certiorari be denied.

Respectfully submitted,

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June , 1986

(3)

Supreme Court, U.S.
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No. 85-1947

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985

WILLIAM I. KAUFMAN, *Petitioner,*
v.
McCRORY STORES DIVISION OF McCRORY CORP. (N.Y.) sub. of RAPID-AMERICAN CORP. (Del.); HELENA L. BOWES, Individual; GEIGER and LORIA REPORTING SERVICE, INC. (Penna.),
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS McCRORY CORPORATION AND RAPID-AMERICAN CORPORATION

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23 pp

QUESTIONS PRESENTED

1. Whether a privately employed stenographer who is also a notary public acts under color of state law when she records and transcribes the deposition of witnesses as part of the discovery process in a civil action.

2. Whether private persons, none of whom is a state official or who acts under color of state law, can be liable under 42 U.S.C. §1983 upon allegations that they conspired with a privately employed stenographer to alter deposition transcripts in a civil action.

PARTIES TO THE PROCEEDING

In the District Court, Petitioner's complaint named as defendants: (1) McCrory Stores Division of McCrory Corporation, (2) McCrory Corporation, (3) Rapid-American Corporation, (4) Helena L. Bowes, and (5) Geiger and Loria Reporting Service, Inc.

McCrory Stores Division of McCrory Corporation was and is a division of McCrory Corporation. McCrory Stores is not an entity capable of being sued. In the District Court, McCrory Corporation and Rapid-American Corporation filed answers to the complaint. Rapid-American Corporation owns all the common stock of McCrory Corporation and is its parent. The common stock of Rapid-American Corporation is privately held.

Respondents are: (1) Bowes, a stenographer employed by respondent Geiger and Loria Reporting Service, Inc., (2) Geiger and Loria Reporting Service, Inc., (3) McCrory Corporation, and (4) Rapid-American Corporation.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS McCRORY CORPORATION AND RAPID-AMERICAN CORPORATION

Respondents McCrory Corporation ("McCrory") and Rapid-American Corporation ("Rapid") respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the Third Circuit's Order dated April 1, 1986, affirming without opinion the judgment of the United States District Court for the Middle District of Pennsylvania dated July 25, 1985, which granted a motion by respondents McCrory and Rapid for judgment on the pleadings and granted a motion by respondents Bowes and Geiger and Loria Reporting Service, Inc. to dismiss the complaint for failure to state a claim. The District Court's opinion is reported at 613 F.Supp. 1179. The Third Circuit's order of affirmance is as yet unreported.

The Petition should be denied because there is no conflict between the decisions of this Court and that of the Courts below or between different federal circuit courts or between this Court and the highest court of a State. The issues do not reach any level of national or constitutional importance and do not merit review by this Court. Petitioner's grievence simply fails to give rise to any actionable claim under the Civil Rights Act, 42 U.S.C. §1983, because no person acting under color of state law deprived Petitioner of any federally protected right.

STATUTE INVOLVED

Title 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In 1982, Petitioner, a manufacturers' representative, commenced an action in the Court of Common Pleas, Allegheny County, Pennsylvania, against Penn Needle Art Co., as sole defendent, for alleged loss of past and future commissions. In the course of that action, Petitioner caused depositions to be taken of two employees of the McCrory Stores division of McCrory as non-party witnesses. The stenographer-reporter at these depositions was respondent Bowes, who was employed by respondent Geiger and Loria Reporting Sevice, Inc. and whose services were paid for by Petitioner. In addition to being a stenographer-reporter, Bowes was also a Pennsylvania Notary Public. Petitioner believed that in the preparation of

the transcripts, Bowes made omissions and changed the oral testimony, that the two employees of McCrory Stores lied at their depositions, and that they and their employer, McCrory, and their employer's parent corporation, Rapid, conspired with Bowes. Petitioner moved in the state court action to strike such portions of the deposition transcripts as he claimed were wrongfully transcribed. His motion was denied by the state court, from which denial no appeal was taken. Petitioner did not seek to take further depositions of the witnesses. Petitioner then voluntarily settled his state court action with Penn Needle Art Co. for $24,500, while believing that his claim against Penn Needle was worth $250,000.

On April 18, 1985, he filed his complaint in the District Court, invoking jurisdiction under 42 U.S.C. §1983, and asserting that he sustained damages (presumably the difference between $24,500 and $250,000) because the respondents allegedly violated his civil rights under 42 U.S.C. §1983 by depriving him of property in violation of the Fourteenth Amendment's guarantee of due process of law. To satisfy the "State action" requirement, Petitioner claims that Bowes, the privately employed stenographer, was a state actor because she was a notary public licensed as such by the Commonwealth of Pennsylvania. While asserting in conclusory terms that all the respondents "conspired," Petitioner's complaint alleged no direct overt acts of Geiger and Loria, the employer of Bowes, nor of McCrory, the employer of the two witnesses who were deposed in Petitioner's state court action, nor of Rapid, the parent of McCrory. Presumably, Petitioner's theory as to the corporate respondents was that they are liable on the principle of *respondeat superior* or that they conspired with Bowes, who as the stenographic reporter, was acting under color of state law.

The District Court held that the stenographer, who happened to be a notary public licensed by Pennsylvania, was not a state official who acted under color of state law for purposes of 42 U.S.C. §1983 when she recorded and transcribed the deposition testimony.

The District Court's determination, affirmed without

opinion by the Third Circuit, was that the stenographer was not a person acting under color of state law because her assignment as a stenographer, an occupation not licensed by Pennsylvania, entailed functions and obligations in no way dependent upon state authority. Bowes' acts of allegedly altering and omitting portions of transcripts were acts committed in the course of her assignment as a stenographer and not as a notary public. Whether acts of malfeasance by a notary in the exercise of her obligations as a notary could be deemed acts of a person under color of state law was not an issue presented by the allegations of the complaint. Since none of the defendants was a person acting under color of state law, none could be liable under §1983 directly or on theories of *respondeat superior* or conspiracy.

REASONS WHY THE PETITION SHOULD BE DENIED

A. THE ISSUES RAISED IN THE PETITION ARE NOT IMPORTANT ENOUGH TO WARRENT SUPREME COURT REVIEW.

Whether a state court litigant has a federal cause of action against a privately employed stenographer under 42 U.S.C. §1983 for alleged alteration of deposition transcripts is an issue with only academic relevance. Aggrieved litigants have adequate remedies through additional or alternative discovery proceedings within the state judical system. State discovery proceedings already incorporate various sanctions and remedies for the conduct about which Petitioner complains. For this reason, among others, there is no conflict between the decisions of this Court and that of the Courts below, or between different federal appeals courts, or between this Court and the highest court of the State.

A litigant who claims that a stenographer has improperly transcribed deposition testimony can, very simply, request another deposition before a stenographer of his own choosing. If necessary, he can request the judiciary to intervene in and oversee discovery proceedings. In the instant case, Petitioner has merely claimed that questions and answers were altered or

omitted from the transcripts. His remedy should have been to request another deposition or to appeal from the state court's denial of his motion to strike objectionable portions of the transcripts. Instead, Petitioner settled his state court lawsuit for $24,500 and instituted a federal action in an attempt to supplement the amount he received in the state court settlement.

It is unquestioned that none of the respondents did or is charged with doing any act that deprived Petitioner of his rights under Pennsylvania law to notice further depositions of the witnesses, or to appeal from the state court's denial of his motion to strike portions of the transcripts, or to refuse to settle with his former employer for what he claims is an inadequate sum. It is thus obvious that no respondent committed any act which deprived Petitioner of his right to due process, the second of the two elements of a §1983 action.[1]

B. THE ACTS OF A PRIVATELY EMPLOYED STENOGRAPHER WHO IS ALSO A NOTARY PUBLIC ARE NOT FAIRLY ATTRIBUTABLE TO THE STATE WHEN SHE RECORDS AND TRANSCRIBES DEPOSITION TESTIMONY IN A CIVIL ACTION.

Petitioner argues that because a notary public is licensed by the State, is denominated an "officer" in state statutes and performs important public functions, a notary public is therefore a person who acts under color of state law for puposes of Section 1983. Contrary to such claim, the fact that a person is licensed by the State to conduct a trade or profession or is denominated an "officer" or "official" in a State statute establishing the qualifications of such office or defining such person's duties does not confer upon such person the status of state actor or mean that such person's acts are attributable to the State. Although lawyers are licensed by the States and are often referred to as "officers of the court" they are "not

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[1] "(1) Whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

officials of government by virtue of being lawyers." *In re Griffiths*, 413 U.S. 717,729 (1973). Nor are public defenders who are paid by municipal subdivisions of the State necessarily state actors for purposes of §1983. *Polk County v. Dodson*, 454 U.S. 312 (1981). In *Bernal v. Fainter*, 104 S.Ct. 2312, 2319 (1984), the Court stated, albeit on different issue, that "a notary public's duties, important as they are, hardly implicate responsibilities that go to the heart of representative government. Rather, these duties are essentially clerical and ministerial." The Court has held that the fact that a person or business is licensed or regulated by the state does not make one a person who acts under color of state law or convert his acts into that of the State for purposes of the Fourteenth Amendment. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-177 (1972); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974).[2] While licensed by the State, a variety of business activities have been held not fairly attributable to the State for purposes of §1983, including a privately owned public utility, *Jackson*, 419 U.S. 345, a physician, *Sumpter v. Harper*, 683 F.2d 106 (4th Cir. 1982), an insurance company, *Freier v. New York Life Ins. Co.*, 679 F.2d 780 (9th Cir. 1982), and a private attorney, *Dahlberg v. Becker*, 748 F. 2d 85 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 1845 (1985).

Whether a person charged with acting under color of state law is indeed a state actor, turns not only on whether that person's authority derives from the State, but more importantly, on whether the conduct of such person allegedly causing the deprivation of a federal right is "fairly attributable" to the State. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Action by a private party, without more, is not sufficient to justify a characterization of that party as a "state actor." *Id.* at 939. By no stretch of imagination can the alleged malfeasance

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[2] In *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 354, the Court observed: "Doctors, optometrists, lawyers, Metropolitan, and [an] upstate New York grocery selling a quart of milk are all in regulated businesses, essential goods and services 'affected with a public interest.' We do not believe that such status converts their every action, absent more, into that of the State."

of a privately employed stenographer in recording and transcribing depositions in a civil action be acts attributable to the Commonwealth of Pennsylvania. The status of the stenographer as a licensed notary does not elevate the alleged malfeasance of the stenographer into acts for which the Commonwealth would be responsible.[3]

Petitioner cites *Krueger v. Miller*, 489 F. Supp. 321 (E.D. Tenn. 1978), *aff'd*, 617 F. 2d 603 (6th Cir. 1980), for the proposition that a notary public is, for all intents and purposes, a state actor within the reach of 42 U.S.C. §1983. In *Krueger*, the District Court held that a person acts under color of state law when he uses his authority as a notary public and a magistrate to pretend also to possess the authority of a deputy sheriff. 489 F. Supp. at 329. The instant case is clearly distinguishable because, unlike the conduct complained about in *Krueger*, here the privately employed stenographer assigned to take and transcribe deposition testimony did not perform functions which were in any way dependent on state authority, *see Polk County v. Dodson*, 454 U.S. at 318, and she did not pretend to be anyone other than a privately employed stenographer.

C. AN ALLEGED CONSPIRACY AMONG PRIVATE PERSONS, NONE OF WHOM ACTS UNDER COLOR OF STATE LAW, FAILS TO STATE A CLAIM UNDER 42 U.S.C. §1983.

Because Bowes was not a state actor for purposes of §1983, to the extent that Petitioner's claims against Bowes' employer, respondent Geiger and Loria, are predicated upon the theory of *respondent superior*, they are without merit. Section 1983 will not support a claim based on a *respondeat superior* theory of liability. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978). *See also Polk County v. Dodson*, 454 U.S. at 325.

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[3] If Pennsylvania's licensing scheme for notary publics made Bowes' action that of the State, "then presumably the actions of a lone Pennsylvania cab driver could also be fairly treated as those of the State of Pennsylvania." *cf. Jackson v. Metropolitan Edison Co.*, 419 U.S. at 350 fn. 7.

While private persons who conspire with one who acts under color of state law may be liable under §1983, an alleged conspiracy solely among private persons, none of whom acts under color of state law, fails to state a cognizable, jurisdictional claim under §1983. *Polk County v. Dodson*, 454 U.S. at 315. The Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). Since none of the respondents was a person acting under color of state law, Petitioner failed to state a claim under §1983.

CONCLUSION

Petitioner's Application for a Writ of Certiorari should be denied.

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No. 85-1947

In the

SUPREME COURT OF THE UNITED STATES
October Term, 1985

WILLIAM I. KAUFMAN

Petitioner,

v.

McCRORY STORES DIVISION OF McCRORY CORP. (N.Y.) sub. of RAPID AMERICAN CORP. (Del.); HELENA L. BOWES, Individual; GEIGER & LORIA REPORTING SERVICE, INC. (Penna.);

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF WRIT OF CERTIORARI BY PETITIONER WILLIAM I. KAUFMAN

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EDITOR'S NOTE

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REPLY BRIEF IN SUPPORT OF WRIT OF CERTIORARI
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ARGUMENT IN REPLY TO RESPONDENTS

A. THE ISSUES RAISED IN THE PETITION ARE OF GREAT IMPORTANCE TO ALL THE PEOPLE OF THE UNITED STATES AND THEREFORE WARRANT SUPREME COURT REVIEW

In the Respondents' answers to the Petitioner's Reasons for Granting the Writ of Certiorari, they seem to skirt and avoid the main issue of what the Petition is all about. That issue is the preservation of

democracy through a Court System that offers no sanctuary to persons who would attempt to avoid and alter the truth in an ancillary court proceeding. The respondents' answers would seem to advance the mistaken theory that liberty and justice can survive over the years in the face of tainted and manipulated evidence and that their methods of participating in and conducting court ordered depositions should be allowed to survive unchallenged by this court and with no penalty what so ever for their alleged illegal acts. Their answers say in essence that Procedural Due Process, as guaranteed by the 5th and 14th Amendments to the Constitution, is to be followed where it suits their needs and avoided where it does not.

Contrary to what they would advance, a favorable decision on this Writ, and the case of Kaufman v. McCrory would ultimately effect, for the good of the country every law firm, every deponent,

every court and every civil action. It would offer a Federal remedy through 42 U.S.C. 1983 to those who are hurt intentionally by persons seeking to protect their private interests by having a Notary-Reporter alter and change depositions in their favor. In a time when approximately 90% of all Civil cases are settled out of court and when thousands of cases are placed in Arbitration proceedings each year both in the Federal and the State Court Systems, the taking of depositions has almost become the trial for most participants in civil suits. Depositions in reality have now become the main means for extracting the truth, for the vast majority of civil litigants. If testimony of witnesses is arranged for in advance as has happened in this case on June 27, 1983 and protection is offered to those witnesses where their untruthful testimony is challenged, by simply having their false statements changed by a willing Court

Reporter and the Reporting Service she is employed by, then under the climate of today's heavy reliance on depositions, a case can be manipulated to achieve a desired result.

This is not the fair trial process as guaranteed by the 5th and 14th Amendments but a type of trial process more closely related to the complete lack of Due Process after 1933 during the evil regime of Adolph Hitler. Then property was regularly taken away from its rightful owners on the basis of false evidence and perjured testimony. Yet, the German people at the time had the Weimar Constitution, a document that had many similar provisions to the United States Constitution. The Encyclopedia American Annual of 1933 from the Library of Congress lists some of these as follows: (pg. 346).

> "The commonwealth is a republic and the power of the state is derived from the people: all Germans are equal before the law. Men and women have fundementally the same civil rights and duties: and further "religious freedom, freedom of speech and the press are guaranteed"

Yet within one year, Amer. Annual of 1934, 270 reported: from the section, Constitution,

> "The colapse of popular government in 1933 has made uncertain the future of this document. At the close of 1933, the constitution was practically a dead letter"

The breakdown of law and order in Germany at the time and the complete lack of procedural due process led directly to the deaths of approximately 35,000,000 people throughout the world. Democracy can not long exist side by side with manipulated lawsuits and tampered evidence.

From the book, The Great Rights, 52, Pa. State Library comes this statement from the Section written by the Honorable and respected late Mr. Justice Hugo L. Black:

> "Most of these Fifth Amendment prohibitions are both definite and unequivocal. There has been much controversy about the meaning of "Due process of law" Whatever its meaning however, there can be no doubt that it must be granted. Moreover few doubt that it has an historical meaning which denies Government the right to take away life, liberty or property without trials properly conducted according to the Constitution and laws validly made in accordance with it."

To insure that Due Process is upheld, Notary Reporters and the parties that conspire with them in misconduct should come under 42 U.S.C. 1983 and should receive no immunity for their illegal acts. There are principals at stake here that are basic to the United States constitution and should be reviewed by this Honorable Court. The taking of depositions should be strengthened rather than weakened as the District Court's decision has surely done.

The respondents in their briefs imply that the petitioner did not do all he could in trying to cure the defective and changed depositions within the state court system. That is hardly true since Kaufman acting Pro. Se. made a strong effort in open court on Oct. 24, 1983 before State Judges, the Hon. Narrick and Staisey to have the cutoff date for Discovery reopenned. But that court held firm to the standing order of court that the discovery period had ended on Sept. 7, 1983. This was affirmed in a

written order by the two judges on Nov. 2, 1983 stating that Discovery was closed. But even if Discovery had been allowed to continue to help cure the defects and gain the truth, this did not absolve the respondents of their responsibility or liability for trying to destroy the petitioner's constitutional rights. When a person commits an illegal act, such as bank embezzlement and he later makes restitution to the damaged parties, he has still committed the crime and must be held accountable for what he has done. In no way could the alleged conspiracy to change the depositions and cover the truth been erased or made proper by the State court. It might have aided the petitioner in his right to a fair trial but the illegality was still there. A 1983 action was still open to be pursued in an alleged conspiracy between private parties and a duly appointed state officer.

Further, this court has long held that a person does not have to seek a long

arduous road through the state courts to gain a Federal remedy. The case of Monroe v.Pape. 81 S.Ct.,473 (1961) states as follows:

> "Under statute making every person who, under color of any state statute, ordinance, regulation, etc. deprives any citizen of the United States of his constitutional rights liable to party injured, federal remedy is supplementary to the state, and state remedy, if any, need not be first sought and refused before federal one is involved. 42 U.S.C.A. 1983."

This protection for the rights of all Americans has been stated by this court not because the various states cannot handle guaranteed rights in their own systems but because this court has recognized that sometimes the state laws might not be enforced to guarantee constitutional rights. Monroe v. Pape also states as follows:

> "One reason for passage of federal statute providing that every person who, under color of any state statute ordinance, custom, etc. deprives any citizen of the United States of his constitutional rights is liable to party injured was to afford a federal

> right in federal courts where because of passion, prejudice, neglect, intollerance or otherwise, state laws might not be enforced and claim of citizen to enjoyment of rights, privileges and immunity guaranteed by Fourteenth Amendment might be denied by state agencies. 42 U.S.C.A. 1983."

Other cases that have held that an injured party may seek Federal action outside the state government are: McNeese Jr. v. Board of Education for Community Unit School District 187, Cahokia, Illinois, et all. 83 S. Ct. 1433 (1963), Patsy v. Florida Board of Regents. 457 U.S. 496 (1982) and Mitchum v. Foster 92 S. Ct. 2151 (1972). Clearly this court haS spoken on the rights of injured persons to seek a Federal solution and respondents' efforts should not be accepted on a total state answer to a serious constitutional problem; the right to a Fair Trial and the right to full Due Process. Innocent parties should be prctected by this Court from unlawful tampering with their law suits in the Penna. State Courts.

B. THE ACTS OF A NOTARY PUBLIC WHO IS PERFORMING OFFICIAL DUTIES AS AN EXAMINER AT A STATE COURT DEPOSITION AND UNDER PENNA. STATUTE MUST BE ATTRIBUTABLE TO THE STATE AND UNDER COLOR OF STATE LAW.

Both the District Court in its opinion and the respondents in their reply briefs try to avoid Federal intervention under 42 U.S.C. #1983 by making a simple assertion that Bowes was acting merely as a regular stenographer between the time she gave the oath to the depondents and the time she put her signature on the depositions in a non legal certification with no seal or no commission ending date. No proof is offered for their assertions since none can be found in any statute, any reference material or in any previous cases. The only proof they offer is that Bowes was somehow acting like the lawyer in Polk County v. Dodson 454 U.S. 312 (1981). Surely after almost 200 years since the constitution was first written in 1787, there should have been at least one case that could have been used to back up their contentions. Polk County does not

even mention Notaries, Court Reporters or stenographers. Beside the poor logic of their argument, their attempts to relate this case to Polk County should fail because of a clear lack of legal precedence and an overwhelming amount of proof as offered in the Petition for the real view of the situation; that she was acting completely under the Penna. Notary Public Act of 1953 and the Penna. Rules of Civil Procedure, and indirectly under the U.S. Constitution, 5th and 14th Amendments.

Based on this decision on Kaufman v. McCrory, a party in a deposition would have to bring two people to a deposition in order to establish legal responsibility under the law. One would have to be the Notary Public to give the oath and act as the examiner and the other would have to be a stenographer. To do anything else under the District Court decision would create a situation where there would be no official examiner and no potential liability under 42 U.S.C. #1983. Obviously

this would be a foolish extra expense to an already expensive procedure and would depart completely from the custom throughout the U.S. of using court reporters who embody both the functions of a Notary Public and the functions of a stenographer. Yet to follow the normal course as in this case based on the District Court decision there would have been no official control over the depositions by a duly appointed state officer between June 28, 1983 when the depositions were taken and July 19, 1983 when they were finished and signed for without proper certification. This is a long period to leave uncompleted evidence with no state supervision. Anything could happen and did.

Beside the already extensively inrumerated duties and responsibilities of a Notary Public-Reporter, Examiner at a state court depcsition comes this further proof that a stenographer, acting in an official capacity can be held liable under 42 U.S.C. #1983. The case of Washington v.

Official Court Stenographer, U.S. D.C. E.D. Pa., 251 F. Supp., 945 (1966) says as follows:

> "Civil rights statute allowed action by indigent prisoner against court stenographer for alleged failure of latter to obey two court orders relating to furnishing of transcript to be brought in federal court, state remedies notwithstanding, and doctrine of exhastion of state remedies was inapposite. 42 U.S.C.A. # 1983."

This decision states in effect that a stenographer engaged in official duties can be held liable under a #1983 action when she acts with negligence or intentional miscounduct during, preceding or after a court trial. There are many similarities in this Washington case to the Kaufman v. McCrory case. Both stenographers were doing official court duties, the one was acting as a Notary-examiner during officially ordered court depositions, the other was employed by the court in official duties. Both were to have given properly finished transcripts to private parties under court orders and state law. Neither compiled. Bowes submitted changed and altered

depositions and the Court Stenographer submitted no trarscripts at all. Bowes, the Notary Public acting as a stenographer in official duties as an examiner should be held equally liable to 42 U.S.C. #1983, the same as the Court Stenographer was in Washington. Bowes should receive no immunity for the necessary stenographic part of her role as an official examiner. The writers of the Civil Rights Act of 1871 never meant for immunity to be so broad that some state actors could escape liability on sheer technical grounds that go beyond logic. She should not escape liability for alleged misconduct just because some of her official duties as a Notary-Reporter-Examiner required stenographic work to be performed.

From Federal Procedure, Lawyers Edition, Book 10, Chapter 26, comes this:

> "26:121 Recording and Transcribing Testimony - The officer before whom the deposition is to be taken must personally or by someone acting under his direction and in his presence record the testimony of the witness. The testimony must be taken stenographically or recorded by other

means ordered in accordance with FRCP 30 (b) (4) which is discussed below"

The Penna. Law Encyclopedia, DEPOSITIONS, Sec. #15, pg. 116, says essentially the same thing concerning the State of Pennsylvania. There is no mention of taking anything down but the complete testimony of the witness fully and whatever he said, whether he lied or not.

Yet when the transcripts were finished they contained significant changes from what was spoken. The place in the Agnew transcript where the April 5, 1983 meeting was supposed to be was changed completely as illustrated in the following conversation (paraphrased) that took place in the first 15 to 20 minute recess that was completely blocked out:

> SULLIVAN TO KAUFMAN: What else do you want me to ask him after the recess?
>
> KAUFMAN TO SULLIVAN: You didn't ask him any questions about the April 5th meeting, so far. (Referring at the same time to notes of suggested questions, June 22, 1983 Ex. #19 attached to Complaint)
>
> SULLIVAN: All right, I'll ask him questions about that meeting when we start again.

When the depositions were completed, the April 5, 1983 meeting was mixed in with questions of the first meeting of June 19, 1983. Fair Justice now and in the future requires that this entire situation be opened and the respondents made to answer for what they have done. America deserves respect for the law.

C. THE ALLEGED CONSPIRACY BETWEEN THE PRIVATE PERSONS AND A PUBLIC OFFICER COMES UNDER COLOR OF STATE LAW AND UNDER 42 U.S.C. 1983.

As the case of Krueger v. Miller, 489 F. Supp., 321 (E.D. Tenn. 1978) aff'd 617 F, 2d, 603 (6th Cir. 1980) clearly shows, a Notary Public acting in misconduct can be held liable under #1983. Misconduct on the part of public officials and the private persons who would conspire with them covers a myriad of wrongs but the essential idea is that they must be held accountable under the law of 1871. The possibility for penalty must be clear to all state officials who misuse their authority and to the parties who conspire with them.

This court has held and stated in many cases that persons acting in conspiracy with public officials can be liable under §1983. Respondent Superior cannot apply where the conspiracy is so broad and where persons throughout an organization have set a climate for wrongdoing. The case of Monell et. al. v. Department of Social Services of the City of New York, 436 U.S. 658 (1978) is illustrative of this point as follows: (pg. 694)

> "Instead it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983. Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court, see supra, at 600-602 we must reverse the judgement below."

When the officials of McCrory Corp. and Rapid American Corp. made it clear policy to the Buyer, Agnew and the Merchandise Manager, Boukis, that they must deal direct under many instances in order to save the

companys' money on their vendor purchases, they also implied and directed such policy must be held to, at all costs, even to the extent of allegedly perjured testimony, in official court papers. This policy was actively carried out in the meeting between Agnew, Boukis, company lawyers, Osterman, Berger and possibly other McCrory official on June 27, 1983 to ascertain what Agnew and Boukis should say at the next day's depositions in line with company policy on purchases. Likewise, the policy followed by Bowes, in changing and altering depositions and withholding proper certification was in line with the overall policy of Geiger and Loria as set by her mother, Virginia Loria, owner and President. All the pertinent details of this overall conspiracy by all persons involved cannot be fully documented until Discovery is undertaken and a trial is under way. Yet the overall framework of the total conspiracy indicates a far deeper involvement by Rapid, McCrory and Geiger &

Loria than mere acts of 3 people Agnew, Boukis and Bowes as the Respondents would tend to indicate. The theory of respondent superior cannot apply in this case nor was it intended to apply. Re: Turpin v. Mailet, et. al. 619 F. 2d 196 (1980).

That corporations can be sued as entities, and as persons under the various Civil Rights Acts is apparent from the case of Davis v. Jobs for Progress, Inc. 427 F. Supp. 479 (1976) stating as follows:

> "Corporation which operates manpower education program under subcontract with city of Phoenix with funds provided by United States Department of Labor and which hired certified teachers as instructors was an employer as that term is defined in Title VII of Civil Rights Act of 1964 and was person within meaning of relavent provisions of Titles VI and VII of the Civil Rights Act of 1964."

Therefore as persons under the above involved in a conspiracy to violate Kaufman's Civil Rights to Due Process under the 14th Amendments, and also with a public official, respondents should be held liable under such cases as Dennis v. Sparks, 449 U.S. 24,

(1980) Lugar v. Edmondson Oil Co., Inc. 457 U.S. 922 (1982) and Briscoe v. Lahue, 103 S. Ct. 1108 (1983).

Aside from the part of the petitioners' state law suit, mainly concerning Boscov's Dept. Stores, Reading, Pennsylvania that was settled for $24,500, the major McCrory part was almost totally ruined by the respondents. Justice requires that they be held accountable.

CONCLUSION

For the foregoing reasons and in the public interest, a writ should issue.

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